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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte BRIAN KOHNE

Appeal 2010-001789
Application 10/090,206
Technology Center 2400

Before JEAN R. HOMERE, THU A. DANG, and ANDREW J. DILLON,
Administrative Patent Judges.

DANG, *Administrative Patent Judge.*

DECISION ON APPEAL

I. STATEMENT OF CASE

Appellant appeals the Examiner's final rejection of claims 1-24 under 35 U.S.C. § 134. We have jurisdiction under 35 U.S.C. § 6(b).

We affirm.

A. INVENTION

According to Appellant, the invention relates to the field of television, and more specifically, to the selection of backgrounds displayed with interactive programming guides (Spec. 1, ¶[0002]).

B. ILLUSTRATIVE CLAIM

Claim 1 is exemplary and is reproduced below:

1. A method comprising:
receiving input identifying a first broadcasted program; and
selecting content, based on the input, to be displayed in a background area of an interactive programming guide; and
determining that the first broadcasted program is selected for at least a time greater than a predetermined threshold; and
responsive to determining that the first broadcasted program is selected for at least a time greater than the predetermined threshold, displaying the selected content in the background area of the interactive programming guide, wherein the selected content is overlapped by information related to the first broadcasted program.

C. REJECTION

The prior art relied upon by the Examiner in rejecting the claims on appeal is:

Rowe	US 5,812,123	Sept. 22, 1998
Reynolds	US 2006/0010469 A1	Jan. 12, 2006

Claims 1-24 stand rejected under 35 U.S.C. § 103(a) as unpatentable over the teachings of Reynolds and Rowe.

II. ISSUE

The pivotal issue before us is whether Appellant has demonstrated that the Examiner erred in concluding that Reynolds and Rowe would have suggested “receiving input identifying a first broadcasted program” and “selecting content, based on the input, to be displayed in a background area of an interactive programming guide” (claim 1; emphasis added).

III. FINDINGS OF FACT

The following Findings of Fact (FF) are shown by a preponderance of the evidence.

Reynolds

1. Reynolds discloses a hybrid passive-interactive program guide that is generated by combining the features of an interactive program guide with the passive video portion of a passive program guide (Abstract).

2. The hybrid guide may provide users with interactive guide features while simultaneously providing users with the video portion of the

passive guide, wherein any suitable interactive guide feature may be provided to replace portions of the passive guide or to supplement the passive guide (p. 8, ¶[0087]).

3. The hybrid guide may be generated by the interactive guide using any suitable overlay technique to overlay program listings display areas, text display areas, graphic display areas, video display areas, or interactive features areas onto the passive guide display screen (p. 8, ¶[0089]).

4. The interactive guide may supplement passive content of a passive guide with interactive content, wherein the interactive guide may determine, based on the playlists or other passive guide characteristics, that the passive guide is promoting a specific product or program and then overlay a supplemental advertisement or other supplemental information for the same product or program onto the passive guide display screen (p. 9, ¶[0096]; Figs.9a & 9b)

IV. ANALYSIS

Claims 1-7 and 22

As to independent claim 1, although Appellant initially notes that Appellant incorporates the substance of the Amendment And Request For Reconsideration filed January 12, 2009 herein by way of reference (App. Br. 4 and similarly App. Br. 6), any argument “not included in the brief or a reply brief filed pursuant to § 41.41 will be refused consideration by the Board.” See 37 CFR § 41.37(c)(1)(vii) (2010). That is, we will only

consider in this opinion arguments specifically provided in the Appeal Brief and the Reply Brief.

In the Appeal Brief, Appellant merely contends that “nowhere does Reynolds teach or suggest displaying content selected in the interactive guide in the passive guide display screen” (App. Br. 6), and that “one skilled in the art, starting from Reynolds, would not have had an apparent reason to modify Reynolds” (App. Br. 5). In particular, Appellant argues that Reynolds’ passive guide display merely “corresponds to a specific and passive channel in a broadcast lineup” (App. Br. 6), and “the Office has continued to disregard passages in Reynolds that teach away from the above-noted features recited in claim 1” (App. Br. 4).

The Examiner finds that “Reynolds discloses a user highlighting or selecting . . . a first broadcasted program . . . and selecting content including any elements of the passive guide, based on the input of the highlighted program to be interactive when the user indicates a desire to access interactive features in response to selecting a program listing” (Ans. 13). In particular, the Examiner notes that “[t]he claim does not state what the selected content is” (*id.*).

As to Appellant’s “reason to modify” argument, the Examiner finds that “[t]here is proper motivation to combine as the Rowe’s invention of an interactive guide is analogous to Reynolds’[] invention of an interactive guide” (Ans. 12). That is, according to the Examiner, “[t]he motivations to combine Rowe with Reynolds are to prevent rapid and unnecessary updates of the program display if the user is simply scrolling through the program

guide” and that “the combination of Rowe does not frustrate the intended purpose of Reynolds” (*id.*).

To determine whether Reynolds in view of Rowe would have suggested “receiving input identifying a first broadcasted program” and “selecting content, based on the input, to be displayed in a background area of an interactive programming guide” as recited in claim 1, we give the claims their broadest reasonable interpretation. *See In re Bigio*, 381 F.3d 1320, 1324 (Fed. Cir. 2004). However, our analysis will not read limitations into the claims from the specification. *See In re Van Geuns*, 988 F.2d 1181, 1184 (Fed. Cir. 1993).

We agree with the Examiner that that “[t]he claim does not state what the selected content is” (Ans. 13). Rather, claim 1 merely requires that the selected “content” is “based on” an “input identifying a first broadcasted program.” In fact, claim 1 does not even define as to what an “input” means, includes or represents other than that the input is received (from any source) and identifies (in anyway) a first broadcasted program. Thus, we give the claim its broadest but reasonable interpretation as requiring selecting a content to be displayed in a background area, wherein the content is based on any input information that relates to a broadcasted program, as specifically defined in the claims and consistent with the specification.

Reynolds discloses a hybrid passive-interactive program guide that combines the features of an interactive program guide with the passive video portion of a passive program guide (FF 1), wherein interactive guide features may be provided to replace portions of the passive guide or to supplement

the passive guide (FF 2) and the interactive features are overlaid onto the passive guide display screen (FF 3). For example, the interactive guide may determine, based on the playlists, that the passive guide is promoting a specific product or program and then overlay a supplemental advertisement or other supplemental information for the same product or program onto the passive guide display screen (FF 4).

We find “a background area” of claim 1 to read to Reynolds’ passive-interactive program guide that is overlapped by broadcasted program. Furthermore, we find Reynolds’ selection of interactive features, such as advertisement or other supplemental information, to be displayed on the passive-interactive program guide based on the playlists to comprise selecting a content to be displayed in a background area, wherein the content is based on input information that identifies/relates to a broadcasted program.

Although Appellant argues that “nowhere does Reynolds teach or suggest displaying content *selected in the interactive guide* in the passive guide display screen” (App. Br. 6, emphasis added), such argument is not commensurate in scope with the language of claim 1. That is, claim 1 does not require that the content be “selected in the interactive guide” but rather merely that the content is “based on the input” which is “identifying a first broadcasted program” (claim 1). In view of our claim interpretation above, we find Reynolds’ selection of interactive features to be displayed in the passive guide based on information relating to the broadcasted program to comprise such features.

Further, by arguing that Reynolds shows or does not show (App. Br. 6), Appellant appears to be arguing that Reynolds individually does not anticipate the claimed invention. However, the test for obviousness is not what each reference shows, but what the combined teachings *would have suggested* to one of ordinary skill in the art. *See In re Merck & Co.*, 800 F.2d 1091, 1097 (Fed. Cir. 1986).

We find that Reynolds' teaching of selecting content for display in the passive guide display based on information related to the broadcasted program (FF 1-4) to at least suggest "selecting content, based on the input, to be displayed in a background area of an interactive programming guide" as specifically recited in claim 1. As Appellant admits, providing a background area that "may appear" to be behind or overlapped by the information about broadcasted programs is well known (Spec. 3, ¶[0004]). Reynolds discloses such background area, wherein selection of content for display in the background area based on information relating to the broadcasted programs. Thus, even though Appellant argues that Reynolds does not specifically show the recited features (App. Br. 6), we conclude that selecting content based on the input identifying the broadcasted program to be displayed in a background area would at least have been suggested to the skilled artisan by Reynolds. *KSR Int'l Co. v. Teleflex, Inc.*, 550 U.S. 398, 416 (2007). The skilled artisan is "a person of ordinary creativity, not an automaton." *Id.* at 421.

Though Appellant also contends that "one skilled in the art, starting from Reynolds, would not have had an apparent reason to modify Reynolds"

(App. Br. 5) because passages in Reynolds “teach away” from the recited features (App. Br. 4), our reviewing court has held that “[a] reference may be said to teach away when a person of ordinary skill, upon [examining] the reference, would be discouraged from following the path set out in the reference, or would be led in a direction divergent from the path that was taken by the applicant.” *Para-Ordnance Mfg., Inc. v. SGS Importers Int’l., Inc.*, 73 F.3d 1085, 1090 (Fed. Cir. 1995) (quoting *In re Gurley*, 27 F.3d 551, 553 (Fed. Cir. 1994)).

Appellant has identified no express support for a direction divergent from the claimed invention. In particular, the passages of the Background Art of Reynolds presented by Appellant focuses upon the disadvantages of passive guides, and not the disadvantages of incorporating a minimum time threshold for the broadcasted program being selected, as taught by Rowe. That is, Appellant has not identified any express support for the argument that one would not have incorporated Rowe’s minimum time threshold to the teachings of Reynolds.

Here, the Appellant appears to have viewed the references from a different perspective than the Examiner. The issue here is not whether Reynolds teaches disadvantages to passive guides but rather whether a person of ordinary skill, upon reading Rowe, would be discouraged from applying a minimum threshold to the time for the selected broadcasted program of Reynolds. We find no error in the Examiner’s finding that “[t]here is proper motivation to combine as the Rowe’s invention of an interactive guide is analogous to Reynolds’[] invention of an interactive

guide” (Ans. 12) and that “[t]he motivations to combine Rowe with Reynolds are to prevent rapid and unnecessary updates of the program display if the user is simply scrolling through the program guide” (*id.*).

The Supreme Court has determined that the conclusion of obviousness can be based on the interrelated teachings of multiple patents, the effects of demands known to the design community or present in the marketplace, and the background knowledge possessed by a person having ordinary skill in the art. *KSR*, 550 U.S. at 416. Here, Reynolds and Rowe are directed to the same field of endeavor of displaying programming information. We conclude that such application of applying a minimum threshold to the time as taught by Rowe for the selected broadcasted program of Reynolds in the same field of endeavor is no more than a simple arrangement of old elements with each performing the same function it had been known to perform, yielding no more than one would expect from such an arrangement. *Id.* The skilled artisan would “be able to fit the teachings of multiple patents together like pieces of a puzzle.” *Id.* at 420-21.

That is, although Appellant argues that Reynolds “describes the frustration a user experiences with respect to passive guides” (App. Br. 4), as stated by the Supreme Court, an obviousness “analysis need not seek out precise teachings directed to the specific subject matter of the challenged claim, for a court can take account of the inferences and creative steps that a person of ordinary skill in the art would employ.” *KSR*, 550 U.S. at 418. *See also DyStar Textilfarben GmbH & Co. Deutschland KG v. C.H. Patrick Co.*, 464 F.3d 1356, 1368 (Fed. Cir. 2006).

Accordingly, we find that the Appellant has not shown that the Examiner erred in rejecting independent claim 1 and claims 2-7 and 22 depending therefrom and falling therewith over Reynolds in view of Rowe.

Claims 8-21, 23, and 24

Appellant does not provide different arguments with respect to the rejection of independent claims 8, 15, and 23 from those of claim 1 (App. Br. 6-8). However, as discussed above with respect to claim 1, we agree with the Examiner that Reynolds in view of Rowe would have at least suggested the claim features.

Accordingly, we find that the Appellant also has not shown that the Examiner erred in rejecting independent claims 8, 15, and 23, and claims 9-14, 16-21, and 24 depending respectively therefrom and falling therewith over Reynolds and Rowe.

V. DECISION

We affirm the Examiner's decision rejecting claims 1-24 under 35 U.S.C. § 103(a).

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED